



JAN BREWER
SECRETARY OF STATE
STATE OF ARIZONA

June 5, 2008

C.H. Huckelberry, County Administrator
Pima County Administrator's Office
130 W. Congress
Tucson, Arizona 85701-1317

Dear Mr. Huckelberry:

Thank you for sharing with my office a copy of your Final Report Regarding County Modifications to Election Procedures to Enhance Security and Reliability of Election Results. My staff and I have carefully reviewed the proposal and I would like to share my thoughts.

Be assured, I have made it my top priority over the past five years to ensure that all elections conducted by our county election officials are run in a fair, orderly, accurate, secure and, perhaps most importantly, uniform manner. I have conducted an extensive review and examination of our election systems through the Brewer Voting Action Plan, successfully promoted legislation to provide additional layers of election security, and strengthened the security procedures set forth in the Secretary of State's Election Procedures Manual (Procedures Manual) followed by all of our county election officers.

Although some of your recommendations make sense, most are problematic, unnecessary and/or unjustifiable, and nearly all establish a protocol for Pima County that is vastly different from every other county.

Before I begin, I must take issue with your implication that my office lost the RTA election tape that was filed by Pima County in accordance with A.R.S. § 16-445. This is simply false. My office testified that this tape was sent back to Pima County via U.S. Certified Mail on November 27, 2006, along with hundreds of other programs that were returned to the other counties and local jurisdictions.

It is a strange coincidence indeed that the only program reported lost was your RTA election program, which also happened to be at the center of some very serious allegations involving your election officials. I resent your attempt to blame my office for the convenient loss of this program by your staff. To reiterate, all other jurisdictions were mailed, and received, their programs and there is no evidence to suggest my office lost your program.

ELECTION SECURITY UNDER THE BREWER ADMINISTRATION

You note how anxious you are to learn about my proposals for reform. Thus, allow me to summarize the extensive voting security efforts that have already been implemented during the course of my administration with important security features being added for each of the past five years. This may help you better understand the extent to which I have taken it upon myself to bolster the security and integrity of our elections in Arizona.

It bears repeating that from an election security point of view, Arizona's laws and procedures establish a rigorous end-to-end approach that is among the tightest and most secure in the nation. These statutory and procedural security, educational, and accountability requirements include:

- Rigorously testing and certifying voting equipment at the federal and state levels to uniform and national standards set forth by the Election Assistance Commission as well as Arizona statutory requirements.
- Testing and inspecting all equipment upon purchase and prior to use.
- Testing and inspecting all equipment after routine maintenance and after certified upgrades to firmware, software and hardware have been installed.
- Logic and accuracy testing before and after each election to ascertain that the equipment and programs correctly count the votes cast.
- Preparing and examining each machine before it is sent to a polling place.
- Requiring equipment and ballots to be physically secured at all times.
- Prohibiting access to ballots and equipment without prior authorization.
- Maintaining an inventory of all election media (e.g. memory cards).
- Requiring all election media to be secured at all times.
- Requiring computer programs that run elections to be filed with the Secretary of State and held in escrow before the election.
- Establishing a strict chain of custody procedure (i.e. secure storage, authorized access, two person transportation requirement) to assure that all equipment and software is accounted for at all times.
- Requiring all election management software and equipment to stand alone and not be attached to any other computer or the internet.
- Requiring election equipment firmware and software hash codes be verified against the National Institute of Science and Technology database before each election to assure the integrity of the software used at every election.

- Requiring that the installation and modification of any election management system software or computer programming used for county election administration be observed by a non-election employee designated by the Board of Supervisors.
- Prohibiting the use of wireless communications.
- Requiring software to be checked and reloaded on each machine for each election so that the original source can be tracked.
- Mandating live video surveillance in all of the tabulation rooms with public viewing on the Secretary of State's website.
- Sealing voting machines after the election.
- Securing machines when they are not in use.
- Instructing voters before the election regarding the use of voting machines.
- Training election board inspectors and judges.
- Requiring the county recorder or other officer in charge of elections maintain records that record the chain of custody for all election equipment and ballots during early voting through the completion of provisional ballot tabulation.
- Conducting a post-election audit by manually comparing precinct results to the electronic transmission of those same results before any results are made official.
- Conducting a post-election hand count of a sample of precincts beginning 24 hours after the polls close to assure the machines counted accurately.
- Recounting votes in close elections.
- Resolving election contest actions when there is an allegation that the result is incorrect because of an erroneous vote count.

As I previously noted, many of your recommendations simply propose to implement or build upon the security framework already established in law or my Procedures Manual. As mentioned, while these procedures may be appropriate for Pima County, given its size and resources, they may or may not be appropriate for every county in Arizona. The detail prescribed in your report certainly does not lend itself to a one size fits all approach to the entire state and in many instances would create a non-uniform environment in which our elections are conducted throughout the State.

PIMA COUNTY RECOMMENDATIONS

With regard to your April 3, 2008 report to the Pima County Board of Supervisors, I am at a loss as to why Pima County would argue in court against the release of election databases and then turn around and immediately release more databases than ordered by the court. It is no surprise that the court reversed itself in the post-judgment proceedings and ordered the release of this information given the actions by the Board.

The court's clear finding in its earlier ruling was that the release of additional databases may increase the risk of a security breach in a future election. Thus, all of

your security recommendations mean nothing if the Pima County Board of Supervisors chooses to ignore the advice of its counsel and its own election experts. Quite simply, the Board's unilateral actions have placed all of our elections in jeopardy. I hope that the Board will make future decisions involving election security based on sound reason and judgment and not as a result of pressure from a handful of partisan rabble-rousers.

At this point I can't help but conclude that the Pima County Board of Supervisors never intended to seriously defend the county against this lawsuit. I base this on the Board's decision to ignore the court's order raising security concerns about releasing more information than was initially ordered by the court and then deciding on two separate occasions not to appeal the court's rulings. I made it clear to Pima County that I would consult with the Attorney General to consider intervening on appeal given the potential statewide impact of this case. The County's decision not to appeal has precluded my office and the Attorney General from raising the statewide issues associated with Pima County's actions in this lawsuit.

I seriously question the motives behind the decision not to appeal and I believe this was intentionally done to keep the statewide issues from being addressed by the courts. The County apparently cares little about the affect its actions have on the State as a whole.

1. Impact on Other Counties

Your suggestion that the new election reforms proposed by Pima County could be enacted as options for the other counties is simply not workable. Although you claim that you do not wish to impose your election security standards on every other county, what you propose would in effect create a standard by which all other counties would be judged, without ever having sought input from those counties. It is simply bad policy for one county to push its agenda (which appears to be largely driven by local politics and not on reasoned analysis) on every other county.

2. Discontinuing the Use of Touchscreen Voting Devices

I strongly disagree with your proposal to discontinue the use of touch screen voting devices. This would violate federal and state law and would unnecessarily disenfranchise Pima County voters with disabilities. These machines must be used in every polling place to accommodate voters with disabilities.

The fact that so few voters use these machines establishes either (1) that the procedures are working properly as non-disabled voters are voting on the optical scan equipment and leaving this equipment available for voters with disabilities or (2) that Pima County has failed in its responsibility to reach out to the disabled community and educate these voters about the availability of these voting machines. Based on a recent complaint I received from a disability rights group regarding Pima County's failure to accommodate voters with disabilities, I have to assume it's the latter.

For the past five years I have encouraged Pima County to request grant money available from the U.S. Department of Health and Human Services (HHS) to help accommodate voters with disabilities. I am disappointed that Pima County has not requested the maximum amount available to it and that \$63,688.89, of the money that it has received has not been spent. I would encourage you to refocus your efforts on better serving the voters with disabilities in your community and using the resources available to you rather than recommending proposals that undermine these efforts.

Absent from your report is your earlier recommendation to replace the voting equipment used in Pima County because it is nearly 12 years old. I once again agree with this proposal as it is consistent with my Equipment Refresh Policy set forth in the Election Procedures Manual. This policy recommends that the counties plan and budget to have all voting system hardware replaced at a minimum of every 10 years.

Lastly, I'm appalled at your suggestion that Pima County had no choice but to acquire the Premier touchscreen voting devices because of my decision to award the accessible voting contract to Premier. As you note on page 2 of your report, it was Pima County's decision alone in 1996 to purchase the optical scan equipment still in use today. In other words, I had no choice but to procure the Premier (then Deibold) equipment because of Pima County's decision to purchase Premier equipment in 1996. The Premier touchscreen equipment was the only equipment certified on the federal and state levels to work with Pima County's overall system. Thus, there were no other compatible accessible voting devices available. It is misleading and false to perpetuate to the public that you were not totally and completely responsible for purchasing Diebold equipment for Pima County voters to use. Your County's decision alone, forced the issue.

3. Modifying the Secretary of State's Procedures Manual

Your report recommends that the Procedures Manual be modified to explain more clearly that counties are required to provide my office with 1) a copy of the computer database files created for each election, 2) that these database files constitute the "computer program" described in A.R.S. §§ 16-444 and -445, and 3) that these files are not subject to disclosure under the Public Records Law.

The current version of the Procedures Manual already makes clear that computer programs filed with the Secretary of State in accordance with A.R.S. § 16-445, includes the election management software and databases. (See Manual, October 2007 at p. 86). Thus, it is unnecessary to clarify this unambiguous language. Moreover, your suggestion that the Procedures Manual be amended to clarify that these files may not be disclosed by any jurisdiction under the Public Records Law is inappropriate.

In fact, A.R.S. § 16-445 makes clear that only the program on file with the Secretary of State is not public record. It would be beyond the scope of my authority

under A.R.S. § 16-452 to extend the confidentiality set forth in A.R.S. § 16-445 to the copies of the computer programs in the possession of each county and local jurisdiction. This would require an amendment to the Arizona Public Record Law.

Your report also recommends that the Procedures Manual be amended to require the final election database and program be submitted to the Secretary of State's Office along with the election canvass. Mandating the filing of this information in the Procedures Manual is beyond the scope of A.R.S. § 16-445.

4. Scanning and Posting Ballots on the Internet

Your report recommends that A.R.S. § 16-621 be amended to permit counties to establish a procedure to scan and post ballots online. As I previously noted to you in my letter dated January 17, 2008, A.R.S. § 16-452 prohibits a county from establishing its own procedures for tabulating and storing ballots. As I stated, I believe this proposal involves substantial policy questions related to election administration in Arizona and that such a policy must be vetted and approved by the Arizona Legislature.

Indeed, this proposal was partially vetted by the State Senate this past February. At the Senate Judiciary Committee, you may be aware that I specifically noted that scanning and posting ballots on the internet is a very bad and costly idea. Despite the enormous costs associated with such an undertaking, no compelling argument has yet been made as to what actual benefit will come from this practice. The fact is, there is no benefit that can justify the cost and the excessive burden on county election officials, especially during a critical time when those individuals should be focusing on their critical and timely election tasks.

In the end, it appears that the only justification for this proposal is that scanning and posting ballots on the internet will provide a few "election-integrity watchdogs" a way of conducting their own review of the process. With all due respect, this is hardly justification for such a massive and costly undertaking. Let's not forget that the law already provides these individuals an opportunity to observe the tabulation process, not to mention the significant role that political party observers play throughout the entire process.

Moreover, the contest laws in this State already provide these "watchdogs" or any other individual the ability to question any election and to gain access to the ballots if necessary. To change the statewide policy with regard to a post-election review simply to accommodate a few individuals that have leveled unsubstantiated allegations regarding our election processes is unwarranted.

4. Delaying the Tabulation of Early Votes

Another recommendation you offer is to delay tabulating early ballots until election day. Once again, you are recommending a procedure to alter the manner in which tabulation occurs throughout the State. Moreover, this new policy will

substantially delay the reporting of results for the entire State simply to appease a few individuals.

As with many of your other recommendations, your analysis with respect to early ballot tabulation is flawed and makes little sense. Such a massive change in procedure should not be done merely to accommodate the scheduling needs of political party observers. Let me assure you, the party officials are well aware of the timeline for ballot tabulation and most certainly can make observers available at any time during the entire process if they so desire.

I would suggest Pima County consider following the lead of other counties like Maricopa County when dealing with early ballot tabulation. Maricopa County provides 24 hour security surveillance of all early ballots and accommodates political party observers to assure that they may be present at all times. Let's not forget that the law was recently amended to make it a class 6 felony to release early ballot results before election night. See A.R.S. § 16-551(C). Thus, your practice does little more than cause an unnecessary delay in releasing the tabulation results to the public.

5. Discontinuation of Modem Transmission Results from Polling Places

This may be the worst recommendation contained in your report. Not only will discontinuing the modem transmission of results substantially delay the reporting of unofficial results on election night, it actually introduces a major security vulnerability into the election process. This is a poorly thought out recommendation and Pima County needs to reverse this practice just as quickly as the knee-jerk decision was made to implement it in the first place.

You justify this practice because it will arguably prevent some hypothetical "hacker" from intercepting the results during the transmission and then submitting false results. This justification, however, is undermined by the fact that these results are unofficial and do not become official until they are audited against the actual precinct machines. Any security breach would ultimately be quickly identified during the audit.

More troubling about this policy is that it actually creates a major security vulnerability by providing no independent method for memorializing the results from a given precinct. Your supposed "security procedure" apparently does not even consider that something could happen to the machines and ballots in route to the election headquarters, in which case the results of that precinct would be lost forever. Certainly the odds of some event happening during the transportation of the ballots are low, but they are no doubt far greater than the remote possibility of some hacker intercepting the results, which again would be quickly caught during the post-election audit.

It is amazing to me that Pima County insisted on unilaterally adopting this questionable practice during the Presidential Preference Election in February, despite the fact that this supposed security concern has never occurred in Arizona, is not likely to occur, and would be quickly caught by the mandatory audit that is performed on each

machine that returns to the election office from the polling site. It came as no surprise to me that Pima County was criticized for this practice because it unnecessarily delayed the election results for the entire state.

6. Poll Worker Recommendations

You note in your report that it is likely that Pima County will need to expand the background and security checks for all poll workers. Yet, the counties have always experienced great difficulty in recruiting good citizens to work the polls. This recommendation if implemented may make that task substantially more difficult and costly.

I have yet to hear anyone seriously allege that poll workers are somehow engaged in a scheme to fraud the elections. Not only will it be cost prohibitive to conduct background checks on the thousands of citizens that make themselves available to work the polls, it could also be detrimental to the recruiting effort. I would encourage you to give this recommendation a bit more thought before jeopardizing your ability to run your elections in an orderly manner.

You will recall that my administration established the Premium Board Worker program several years ago, which permits county election officials to approve an alternate method of instruction and testing for premium board workers. See Secretary of State Election Procedures Manual (October 2007) at pp. 110-111. I am pleased to learn about your implementation of a poll worker academy to educate select poll workers about complex voting issues. I am glad that Pima County has finally chosen to implement my Premium Board Worker program.

Finally, I support your recommendations to increase the number of poll workers from six to eight and to recruit sixteen and seventeen year olds to work the polls. However, I must reemphasize that your other recommendations may make these efforts more difficult and costly.

7. Criminal Background Checks on Observers

With regard to your recommendation that a criminal-background check be conducted on any individual with access to the tabulation center, or who is involved in the hand-count verification process, I am not entirely convinced that this is necessary. If the county is following the proper security protocol when observers and hand count board members are present in the tabulation facility, then this should not be an issue.

I agree that certain individuals should not be near ballots or tabulation equipment. Requiring hand count workers to undergo this kind of screening, however, may discourage good people from volunteering their time. Finding enough people to serve as hand count board members continues to be a challenge in many counties. This recommendation, along with your recommendation to increase the hand count sample size, will make that task even more difficult. Moreover, the political parties, who

play an important role in recruiting these workers, should share in the screening responsibilities.

8. Logic & Accuracy Testing by Political Parties

I am pleased to learn that you have decided to follow my instruction to discontinue the practice of providing unsupervised partisan party officials blank ballots to conduct their own logic and accuracy test of Pima County's voting equipment.

I was surprised by your initial resistance to the security concerns I raised regarding this practice in light of the sometimes hysterical concerns raised about election security in Pima County. Nevertheless, your report makes it clear that this practice indeed poses security issues and will be discontinued and I applaud this decision.

9. Multiparty Observation of all Ballot Processing

The proposal to increase controls for early balloting under party observation is vague and needs careful consideration. As noted, the political parties play an important role in the election process, but this role must not interfere with the election officials' ability to do their jobs. The United State Supreme Court has made clear that there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. If not addressed properly, this proposal could create disorder and chaos during the critical tabulation period.

As mentioned earlier, party officials must be limited to observation only and their presence must never be allowed to result in a potential security breach or interfere with official conduct. As noted in A.R.S. § 16-603, party observers must not hinder or delay the count and ballots shall never be permitted to pass from the hands of the election officials. In addition, any procedures involving ballot tabulation, which includes procedures regarding observers, must be set forth the Procedures Manual in accordance with A.R.S. § 16-452.

10. Independent Testing Procedures

You recommend that Pima County contract with two independent nationally accredited and recognized testing firms or laboratories to test and verify all electronic election systems to assure that no changes have been made to the software, programs and databases at any time during the elections.

I have no objection to this proposal and fully support Pima County contracting with these firms. Perhaps Pima County can serve as a test pilot program for this type of review that could later be replicated in other counties. I look forward to hearing your progress on this recommendation and to learn more about the costs to administer this

program. Given the \$2 billion budget shortfall for the State of Arizona, this proposal may be cost-prohibitive at this time.

11. Extending the Election Canvass Deadline

I have no problem with the county extending its canvass so long as the canvass is completed within the timeframe established by A.R.S. § 16-642. Please note that it is imperative for the county to complete its canvass in that time period so that my office can finalize the official canvass as required by law.

I question your reasoning for delaying the canvass to permit "any other interested persons or entities to verify the integrity of the election database and programming" during this period. The only auditing of this information that should occur during this period is by authorized election officials. There is no provision in law that permits you to give non-election officials access to this sensitive information while the election is still underway. Your own report notes on page 12 that releasing a database file immediately after the close of voting for a particular election could be used, among other things, to create false election results different than the official results.

* * *

That are several other general recommendations that are promising but vague. For example, you note that measures will be implemented to identify counterfeit ballots and improve record and video retention policies, but provide no details about how this will occur. In addition, your recommendation to establish an "Election Integrity Oversight Committee," sounds good but I am concerned about who you envision would serve on this committee and how much authority and oversight you believe this committee should have. These are important details that must be made clear and could be contrary to the law and the Procedures Manual.

I must note that your recommendation to improve the chain of custody for ballots during early voting has already been incorporated into recent legislation. This requirement was part of my election security bill that was recently signed into law by the Governor. See Laws 2008, Chapter 110 (HB 2451), § 5 [amending A.R.S. § 16-621(D)] ("The county recorder or other officer in charge of elections shall maintain records that record the chain of custody for all election equipment and ballots during early voting through the completion of provisional voting tabulation").

Your recommendation to increase the minimum sample size during the hand count and early ballot audit set forth in A.R.S. § 16-602 has also been considered by the Legislature during the current session. I remain skeptical of implementing this proposal. The hand count and early ballot audit has only been in law for two years and was successfully implemented following the 2006 General Election and the Presidential Preference Election in February in accordance with the detailed procedures promulgated by my office.

The hand count results clearly established without doubt that the voting machines are accurately counting the ballots. Expanding the sample size may unnecessarily double the length of time to complete the audit, and place an additional and unnecessary burden on our county election officials at a time when they should be focusing their efforts on processing early and provisional ballots. I have yet to hear a valid justification for expanding the sample size so soon after this law has been in effect and your recommendation offers none.

Lastly, I must note that the bulk of your recommendations seem to minimize the significance of our existing security protocol and imply that serious problems exist when nothing could be further from the truth. I must reemphasize the point I made in my earlier letter to you about the importance of following the existing physical security protocol for election equipment in your county to prevent any unauthorized person from having access to electronic voting equipment and ballots. The procedures in Arizona go above and beyond what is necessary to secure an election and it is for this reason that we have never had an election security breach in our State.

Thank you for allowing me this opportunity to comment on your proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Janice K. Brewer". The signature is fluid and cursive, with the first name "Janice" being the most prominent part.

Janice K. Brewer
Arizona Secretary of State

JKB:kt